December 21, 2001

Nina Hatfield
Acting Director
Bureau of Land Management
401 LS
1849 C Street, NW
Washington, DC 20240

Re: Mining Claims Under the General Mining Laws

Dear Ms. Nina Hatfield:

The Office of Advocacy of the U.S. Small Business Administration (SBA) was established by Congress under Pub. L. No. 94-305 to advocate the views of small business before Federal agencies and Congress. Advocacy is also required by the Regulatory Flexibility Act (RFA) to monitor agency compliance with the RFA. 5 U.S.C. § 612. The Chief Counsel of Advocacy is authorized to appear as *amicus curiae* in regulatory appeals from final agency actions, and is allowed to present views with respect to compliance with the RFA, the adequacy of the rulemaking record with respect to small entities, and the effect of the rule on small entities. Id. Pursuant to Public Law 104-121, agency compliance with the RFA is subject to judicial review. 5 U.S.C. § 611.

On October 30, 2001, the Bureau of Land Management (BLM) published a final and proposed rule in the Federal Register on *Mining Claims Under General Mining Laws; Surface Management*. Federal Register, Vol. 66, No. 210, p. 54834; Id., at 54863. The final rule amends BLM's regulations governing mining operations involving metallic and some other minerals on public lands by removing certain provisions of the regulations and returning others to those in effect on January 19, 2001. The purpose of the proposed rule is to obtain further public comment on changes to the regulations that BLM is adopting in the final rule.

The regulations are intended to prevent unnecessary or undue degradation of BLM-administered lands by mining operations authorized by mining laws. BLM asserts the final rule balances the nation's needs to maintain reliable sources of strategic and industrial minerals, while insuring protection of the environment and natural resources on public lands. The Office of Advocacy submits that the final rule and the proposed rule do not comply with the requirements of the RFA.

Regulatory Flexibility Act Requirements

The RFA requires administrative agencies to consider the effect of their actions on small entities, including small businesses, small non-profit enterprises, and small local governments. See 5 U.S.C. §§ 601, et. seq.; Northwest Mining Association v. Babbitt, 5 F.

Supp. 2d 9. When an agency issues a rulemaking proposal, the RFA requires the agency to "prepare and make available for public comment an initial regulatory flexibility analysis" which will "describe the impact of the proposed rule on small entities." 5 U.S.C. § 603(a); *Id.*.

Initial Regulatory Flexibility Analysis

If the proposed rule is expected to have a significant economic impact on a substantial number of small businesses, an initial regulatory flexibility analysis (IRFA) must be prepared and published with the proposed rule. The required IRFA is prepared in order to ensure that the agency has considered all reasonable regulatory alternatives that would meet the agency's policy objectives but minimize the rule's economic impact on affected small entities. In accordance with Section 603(b) of the RFA, each IRFA must address the reasons that an agency is considering the action; the objectives and legal basis of the rule; the type and number of small entities to which the rule will apply; the projected reporting, record keeping, and other compliance requirements of the proposed rule; and all Federal rules that may duplicate, overlap or conflict with the proposed rule.

Requirements of a FRFA

Section 604 of the RFA sets forth the requirements of a FRFA. It states:

§ 604. Final regulatory flexibility analysis

> (a) When an agency promulgates a final rule under section 553 of this title, after being required by that section or any other law to publish a general notice of proposed rulemaking, or promulgates a final interpretative rule involving the internal revenue laws of the United States as described in section 603(a), the agency shall prepare a final regulatory flexibility analysis. Each final regulatory flexibility analysis shall contain--
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> > (1) a succinct statement of the need for, and objectives of, the rule;
> > (2) a summary of the significant issues raised by the public comments in response to the initial regulatory flexibility analysis, a summary of the assessment of the agency of such issues, and a statement of any changes made in the proposed rule as a result of such comments;
> > (3) a description of and an estimate of the number of small entities to which the rule will apply or an explanation of why no such estimate is available;
> > (4) a description of the projected reporting, recordkeeping and other compliance requirements of the rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record; and
> > (5) a description of the steps the agency has taken to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes, including a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule and why each one of the other significant alternatives to the rule considered by the agency which affect the impact on small entities was rejected.

(b) The agency shall make copies of the final regulatory flexibility analysis available to members of the public and shall publish in the Federal Register such analysis or a summary thereof.

Certification

Section 605 of the RFA allows an agency to certify a rule, in lieu of preparing an IRFA, if the proposed rulemaking is not expected to have a significant economic impact on a substantial number of small entities. If the head of the agency makes such a certification, the agency shall publish such a certification in the Federal Register at the time of the publication of the general notice of proposed rulemaking for the rule along with a statement providing the factual basis for the certification. (Emphasis added) *Id.*

RFA Compliance

Preliminarily, it should be noted that the rule that was finalized in November 2000 but became effective in January 2001 was prepared as a result of the District Court for the District of Columbia remanding the final rule that BLM published on February. 28, 1997. The rule imposed reclamation bonding requirement on hardrock mining that occurred on Federal lands. The rule was remanded because BLM failed to comply with the size standards requirement of the RFA. See Northwest Mining Association v. Babbitt,

In reissuing the rule, pursuant to the court's order, BLM met with Advocacy and addressed the issue of size standards. However, other issues concerning BLM's RFA compliance remained problematic. Advocacy provided numerous comments to BLM outlining those concerns. Advocacy incorporated all of its previous comments by reference in its comments in May 2001. Once again, Advocacy is incorporating its previous comments by reference.

The RFA Section of the Proposed and Final Rules

The RFA sections of the proposed and final rules do not comply with the RFA. As stated above, the RFA requires a proposed rule to have an initial regulatory flexibility analysis (IRFA) and the final rule to have a final regulatory flexibility analysis (FRFA) if the rule is expected to have a significant economic impact on a substantial number of small entities. If the rule is not expected to have a significant economic impact, the agency can provide a certification in lieu of an IRFA or FRFA.

The RFA sections of the proposed and final rules do not provide an IRFA, FRFA, or a certification. Instead BLM provides statements regarding the RFA. In short, the statements provide that:

1) BLM prepared a regulatory flexibility analysis on the expected impact of the 2000 rule on small entities, determined that the 2000 rule will have a significant economic effect on a substantial number of small entities, and summarized it in the 2000 rule

(65 FR 69998, 70103). The regulatory flexibility analysis remains on file in the BLM Administrative Record at the address specified in the addresses section.

2) BLM made changes that should reduce the burdens on small entities. The regulations no longer provide for joint and several liability for violations of the regulations, no longer provide for civil liability for violations, simplify the definition of operator, and reduce the burdens of performance standards.
3) The Small Business Administration (SBA) commented in support of the March 23, 2001, proposed rule to suspend the 2000 rule. The principal substantive objection of the SBA to the 2000 rule was to the definition of "unnecessary or undue degradation"' and the inclusion of it in "substantial irreparable harm" as an element. Removing this element from the definition in the proposed and final rules should obviate this objection.

The Concerns Enunciated in Advocacy's Prior Comments Have Not Been Addressed Adequately

In its comment letter of May 2001, Advocacy supported the suspension of the entire 2000 rule. The objections that Advocacy had with the proposed and final rules extended beyond the definition of "unnecessary and undue degradation" and the inclusion of the "substantial irreparable harm" provision without preparing a regulatory flexibility analysis and providing an opportunity for notice and comment.

As it is doing in its current comments, Advocacy incorporated its previous comments by reference in its letter of May 2001. The comments outlined several concerns that Advocacy had with the rulemaking process. The basis of Advocacy's support for the suspension in May 2001 was that Advocacy had concerns about the rule in general, not simply concerns about the "substantial irreparable harm" provision. While Advocacy recognizes and appreciates the fact that the harmful provision has been removed from the rule, to state that this step alleviates Advocacy's concerns is disingenuous and dismisses Advocacy's other concerns.

BLM Has Not Adequately Addressed the NRC Alternatives

One concern that Advocacy consistently voiced was that BLM failed to analyze fully all of the alternatives that were presented by the National Research Council (NRC). Section 604 (a)(5) of the RFA requires the agency to consider alternatives to the chosen action, provide information as to why the particular alternative was selected, and an explanation as to why the other significant alternatives which affect the impact on small entities were rejected.

An example of an alternative that has not been adequately addressed is the NRC recommendation that bond pools be used to mitigate the impact on small entities.[1] Although BLM states that the current regulations allow for bonding pools, this statement is not completely accurate. The current rule does not guarantee the use of bonding pools.

[1] Hardrock Mining on Federal Lands,National Research Council, pp.. 95-97.

It merely states that a BLM State Director may allow for the use of a state bonding pool if the State Director determines that the level of protection is adequate. Fed. Reg. at 54842.

The language of the current regulation is discretionary and could possibly lead to an arbitrary refusal by a State Director and an uneven implementation of the recommendation. It could also allow for the withdrawal of the bond pool approval at any time. If BLM is truly committed to allowing bond pools as recommended by the NRC, it should provide regulations that clearly mandate the recommendation without leaving it to the whim of a particular State Director. If it does not support a non-discretionary pool, it must analyze the alternative and provide an explanation for why it is not being implemented fully.

Relying on a Previous Year's Economic Analysis Is Insufficient for RFA Purposes

Even if the IRFA and FRFA for the year 2000 rule were not problematic, Advocacy asserts that BLM's reliance on the regulatory flexibility analysis that it prepared for the 2000 rule would not fulfill its obligations under the RFA. As a practical matter, the FRFA that was prepared for the 2000 rule cannot possibly fulfill the requirements of the FRFA for the 2001 rule. Section 604 (a)(2) states that a FRFA shall contain "a summary of the significant issues raised by the public comments in response to the initial regulatory flexibility analysis, a summary of the assessment of the agency of such issues, and a statement of any changes made in the proposed rule as a result of such comments." The 2001 proposal solicited comments on permanently suspending the 2000 rule. The comments received for the 2000 rule were on the IRFA prepared for the 200 rule. In that the 2001 proposal suggested permanently suspending the 2000 rule, the comments should have been different.

Moreover, a similar situation was reviewed in North Carolina Fisheries Association v. Daley, 16 F. Supp. 2d 647 (E.D. VA, 1997). In that matter, the Secretary of Commerce certified, in maintaining summer flounder quotas, that the quota would not have a significant economic impact on a substantial number of small entities because the recommended quota was no different from the previous year's quota. There was no indication that the government performed any comparison between conditions in 1996 and 1997. The court stated that "a simple conclusory statement, that because the quota was the same in 1997 as it was in 1996, there would be no significant impact, is not an analysis." Id at 652. The court found that it was arbitrary and capricious for the Secretary of Commerce to make a determination of no significant impact, under the RFA, because the Secretary had failed to consider an important aspect of the problem. Id at 652-653. Accordingly, the court remanded the quota to the agency with instructions for the Secretary to perform an analysis to determine whether there was a significant economic impact on small entities. Id at 653.

Analogously, a court could find that BLM's reliance on the economic analysis that it performed for the 2000 rule in lieu of an IRFA and FRFA for the 2001 rule does not comply with the requirements of the RFA. Like the situation in North Carolina Fisheries, BLM's decision not to perform an economic analysis for the 2001 rule does not take into account changes in conditions over the last couple of years. It assumes the same number of firms,

the same number of small businesses, the same income, the same available resources, the same economic impact, etc.

It is highly unlikely that the economic impact has remained the same. Indeed, BLM's statement in the Small Business Regulatory Enforcement Fairness section of the rule indicates that the impact is not the same. It states that:

> "Evaluated against the baseline of the 2000 rule, BLM has concluded that today's rule will not have a significant economic impact on a substantial number of small entities. This rule should reduce the costs borne by small entities relative to the 2000 rule. However, the magnitude of the cost reductions depends on site and operation specific factors. The removal of the SIH provision will benefit small entities."

One portion of the rule indicates that there is a significant economic impact, another suggests that there is not. This inconsistency is not only confusing, it also raises questions as to whether BLM has made a good faith effort to comply with the requirements of the RFA. A court could find that BLM has not.

Conclusion

The regulatory flexibility information provided in the final and proposed rules that BLM published on October 30, 2001 is inconsistent with the principles of the RFA. the intent of the RFA is to have agencies consider the regulatory impact of rules on small entities. By relying on the economic analysis of the 2000 rule, it is clear that BLM has not assessed the economic impact of the 2001 rule.

The public has an interest in knowing the potential economic impact of a particular proposed regulation. As the court stated when it remanded this rule to BLM in Northwest Mining v. Babbitt, "While recognizing the public interest in preserving the environment, the Court also recognizes the public interest in preserving the rights of parties which are affected by government regulation to be adequately informed when their interests are at stake and to participate in the regulatory process as directed by Congress."*Supra.* at 13. In that BLM has not provided the public with an analysis of the latest variation of this rule, BLM has again failed to inform the public adequately of their interests and interfered with the public's ability to participate in the regulatory process. Accordingly, once again, it has not met its obligations under the RFA.

If you would like to discuss this matter, or if this office can be of any further assistance, please contact Jennifer A. Smith, Assistant Chief Counsel for Economic Regulation. She may be reached either by mail at the above address or by telephone at (202) 205-6943. Thank you for the opportunity to comment on this important regulation.

Sincerely,

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For economic Regulation